No. 42726-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

KATHY ELAINE GLEN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: _____
KRAIG C. NEWMAN
Sr. Deputy Prosecuting Attorney
WSBA #33270

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

TABLE

Table of Contents

TABLE OF AUTHORITIES

Table of Cases

STATUTES

STATEMENT OF FACTS

The appellants statement of facts is sufficient to resolve the issues presented.

ARGUMENT

Ample evidence supported the defendant's conviction for Assault in the Third Degree.

The appellant argues that the State in fact proved that she acted intentionally and because her actions were intentional, the appellant, cannot be found to be negligent. This argument fails on strictly legal basis and on common sense argument.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum,* 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v Joy,* 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v Barrington,* 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v Salinas,* 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v Carmillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In order to convict the appellant as she was charged, the State bears the burden of proving beyond a reasonable doubt that, with criminal negligence, she caused injury to another by a means of weapon or any object capable of causing bodily injury. RCW 9A.36.31.

Appellant argues that if she intentionally assaulted the victim in this case, then she is not guilty of negligently causing injury. This is not proper legal analysis regarding the mental state required to prove this assault.

The proper legal analysis when construing this statute is that the State must prove an act on the part of the defendant, which with criminal negligence causes injury to the victim. The statute does not define weather the act is done intentionally, volitionally or simpl with criminal negligence.

Once the act on the part of the appellant is proven, then the State must prove that the appellant, in so acting, failed to be aware of a substantial risk that a injury may occur and this failure constituted a gross deviation from the standard of care that a reasonable person would exercise in the same situation. Even if the appellant did act intentionally it does not mean that she intended to cause the injury.

This analysis is very similar to that in *State v. Hayward* 152 Wash.App. 632, 217 P.3d 354 (2009). In that case that Court of Appeals ruled that an instruction defining the relationship between "intent" and "reckless" acts, in a case charging Assault in the Second Degree, could mislead the jury. To prove Assault in the Second Degree in that case the State must have proven that the defendant intentionally assault another and thereby recklessly caused substantial bodily harm to that person. The court held that an instruction explaining that if one acts "intentionally" then one acts "recklessly" could confuse a jury into concluding that any intentional assault is by definition a "reckless" act with regard to the injury it may causes.

The intentional mental state and the reckless mental state must be considered by the jury independently. A person could touch someone in a offensive, yet not harmful, way and be found guilty of Assault in the Fourth Degree. For example, throwing room temperature coffee in someone's face. That victim may then slip on the coffee and break a wrist. By intentionally assaulting this person is the defendant guilty of Assault in the Second Degree? The assault is clearly intentional, but was the act done recklessly with regard to the injury? That is for the jury to decide.

Similarly, a person can intentionally push a car door into another person and not intend to cause injury. Was the act done while failing to be aware of a substantial risk that a injury may occur, a failure that

constituted a gross deviation from the standard of care that a reasonable person would exercise in the same situation? That question is for the jury.

The fact that the Appellant most likely acted intentionally does not bar conviction in this case, but evidence was not conclusive that she did act intentionally. The appellant would have the Court believe that it must believe the appellant's theory of the case, or the State's. In review, the Court should weight the evidence in a light most favorable to the State. This means that this Court should resolve any factual dispute in a manner that supports conviction.

The evidence presented at trial supports a factual finding by the jury that the appellant did not intentionally strike the victim with the door, but was acting with criminal negligence when she attempted to close the door. This resulted in the victim's head being trapped between the door and the door frame of the vehicle, and a portion of her ear being cut off.

This facts support every element of the crime charged and because of this there was ample evidence that the appellant committed this crime.

Trial court did not error in refusing to give the requested lesser degree offense instruction for Fourth Degree Assault.

The Supreme Court established the test regarding the entitlement to a lesser included offense instruction to be given to the jury. First, each of the elements of the lesser offense must be a necessary element of the offense charged. *State v Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Second, the evidence in the case must support an inference that the lesser

crime was committed. *Id.* Moreover, there must be a factual showing that only the lesser included/inferior degree offense was committed. *State v Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150, 1154, 2000. The trial courts refusal to give an instruction based on a ruling of law is reviewed de novo; otherwise, the Court of Appeals reviews the trial court's decision regarding the parties imposed instruction for abuse of discretion. *State v. Crittenden*, 146 Wn.App. 361, 365, 189 P.3d 849, 850 (2008).

The trial court, in this case, denied the appellant's request that a lessor degree instruction be given to the jury informing them of the elements of Assault in the Fourth Degree. The court ruled that the facts of the case would not support a conviction on the lessor degree alone.

The ruling is particular to the facts of this case, because the injury to the victim was so severe. As the appellant has explained, this is a case were the victim claimed to be assaulted and the appellant claimed it was an accident. The injury to the victim was substantial. The top portion of her ear was removed. Common experience would lead one to conclude that the victim in this case was hit by the door with great force. The appellant argued that it was merely an accident, but requested an instruction regarding Assault in the Forth Degree, which would allow the jury to find that she in fact intended to strike the victim with the door.

The court concluded that, given the force that the door struck the victim, if the jury found that the appellant struck the victim intentionally then they would have to concluded that it was an act that failed to be aware of a substantial risk that a injury may occur and this failure constituted a gross deviation from the standard of care that a reasonable person would exercise in the same situation. Therefore, the facts of the case did not support a conviction on the lessor degree offense alone. This was a finding that was in the discretion of the court and should not be disturbed on appeal.

CONCLUSION

For this reason the State asks the court to deny both claims of error and affirm the defendant's conviction.

DATED this 25 day of July, 2012.

Respectfully Submitted,

By: _____
KRAIG C. NEWMAN
Sr. Deputy Prosecuting Attorney
WSBA #33270

KCN/lh

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. KATHY ELAINE GLEN, Appellant.	No.: 42726-5-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 25th day of July, 2012, I mailed a copy of the Brief of Respondent to Carol A. Elewski, Attorney at Law, P. O. Box 4459, Tumwater, WA 98501, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 25th day of July, 2012, at Montesano, Washington.

Barbara Chapman

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY ROOM 102
MONTESANO WASHINGTON 98563
(360) 249-3951 FAX 249-6064